

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SANTA CLARA,
Plaintiff,
v.
DONALD J. TRUMP, et al.,
Defendants.

**ORDER DENYING THE
GOVERNMENT’S MOTIONS FOR
RECONSIDERATION AND TO
DISMISS WITH REGARDS TO THE
CITY AND COUNTY OF SAN
FRANCISCO AND THE COUNTY OF
SANTA CLARA**

Case No. [17-cv-00574-WHO](#)

Dkt. Nos. 113, 115

CITY AND COUNTY OF SAN
FRANCISCO,
Plaintiff,
v.
DONALD J. TRUMP, et al.,
Defendants.

Case No. [17-cv-00485-WHO](#)

Dkt. Nos. 107, 111

INTRODUCTION

The government has moved for reconsideration of my April 25, 2017 order enjoining section 9(a) of Executive Order 13768 (“PI Order”).¹ It has also moved to dismiss the City and County of San Francisco’s and the County of Santa Clara’s claims under Rule 12(b)(6) and Rule 12(b)(1). The government’s motions rely heavily on Attorney General Sessions’s two page

¹ In the alternative, the government seeks to clarify the scope of the PI Order. However, in its reply, the government states, “If the Court believes defendants correctly read the Order of April 25, 2017, as not enjoining them from exercising legal authority, independent of the Executive Order, to impose conditions on grant programming, then formal clarification may be unnecessary.” Gov. Recon. Reply at 1 n.2 (SF Dkt. No. 113). The government correctly reads the PI Order as enjoining only section 9(a) of the Executive Order. The PI Order does not address or enjoin any other independent authority that may allow the government to impose grant conditions on funds, as no such issue was before the court.

1 memorandum (the “AG Memorandum”) directed to the grant making components of the
 2 Department of Justice (“DOJ”), which the government argues outlines DOJ’s definitive
 3 interpretation of the Executive Order. Because I conclude that the AG Memorandum does not
 4 change the analysis from the PI Order, the government’s motions for reconsideration are
 5 DENIED.

6 Similarly, with regards to the motions to dismiss, the AG Memorandum does not impact
 7 my prior conclusions that the Counties have standing, that their claims against the Executive Order
 8 are ripe, and that they are likely to succeed on the merits of those claims. I have not previously
 9 addressed San Francisco’s declaratory relief claim. I do so now and conclude that San Francisco
 10 has adequately stated a claim for declaratory relief. The government’s motions to dismiss San
 11 Francisco’s and Santa Clara’s claims are DENIED.²

12 BACKGROUND

13 On April 25, 2017, I granted San Francisco’s and Santa Clara’s motions for a preliminary
 14 injunction enjoining enforcement of Executive Order 13768 section 9(a). Preliminary Injunction
 15 Order (“PI Order”) (SF Dkt. No. 82); (SC Dkt. No. 98). In granting the Counties’ motions, I
 16 rejected the interpretation of the Executive Order that the government put forward at oral
 17 argument, that the Executive Order is a mere directive to the Department of Homeland Security
 18 (“DHS”) and DOJ that does not seek to place any new conditions on federal funds. Even though
 19 government counsel convincingly assured me that this was the accepted interpretation of the Order
 20 throughout the ranks of DOJ, I concluded that the interpretation was not legally plausible in light
 21 of the Order’s plain language and the government’s many statements indicating the Order’s
 22 expansive scope. PI Order at 14.

23 On May 22, 2017, Attorney General Sessions issued the AG Memorandum, putting
 24 forward DOJ’s “conclusive” interpretation of the Executive Order; it essentially repeats the
 25 interpretation that the government proposed at oral argument. *See* Reconsideration Motion,

26
 27 ² The motions for leave to file amicus briefs at SF Dkt. Nos. 114, 119, 120, 121, 122, 123, 124,
 28 125, 126, 127, 128, 129, 130, 131, 132; and SC Dkt. Nos. 118, 122, 123, 124, 125, 126, 127, 128,
 129, 130, 131, 132, 133, 134, 135 are GRANTED. Santa Clara’s motion to file a sur-reply at SC
 Dkt. No. 138 is GRANTED.

1 Attachment A (“AG Memorandum”) (SF Dkt. No. 107). The AG Memorandum states that the
 2 Executive Order does not “purport to expand the existing statutory or constitutional authority of
 3 the Attorney General and the Secretary of Homeland Security in any respect” and instead instructs
 4 those officials to take action “to the extent consistent with the law.” AG Memorandum at 2. It
 5 also states that the defunding provision in section 9(a) will be applied “solely to federal grants
 6 administered by [DOJ] or [DHS]” and to grants that require the applicant to “certify . . .
 7 compliance with federal law, including 8 U.S.C. section 1373, as a condition for receiving an
 8 award.” AG Memorandum at 1-2. The AG Memorandum also states that DHS and DOJ may only
 9 impose these conditions pursuant to “existing statutory or constitutional authority,” and only
 10 where “grantees will receive notice of their obligation to comply with section 1373.” AG
 11 Memorandum at 2.

12 The same day that the AG Memorandum was released, the government moved for leave to
 13 file a motion for reconsideration of the PI Order on the grounds that the AG Memorandum
 14 contradicts conclusions central to my justiciability and merits determinations. Reconsideration
 15 Motion (“Recon. Mot.”) at 4 (SF Dkt. No. 107); (SC Dkt. No. 113). The Counties opposed the
 16 motion for leave, arguing that the government had not been diligent in bringing the motion and
 17 had failed to demonstrate that the AG Memorandum was a material change of fact or law, as
 18 required by Civil Local Rule 7-9. *See e.g.* SF Opposition to Motion for Leave at 1-4 (SF Dkt. No.
 19 103). I granted the government’s motion for leave without addressing these arguments to avoid
 20 creating a procedural ambiguity regarding the government’s time to appeal the PI Order, and the
 21 government promptly filed its motions for reconsideration. *See* Leave Order at 1-2 (SF Dkt. No.
 22 106).³

23 While its reconsideration motions were pending, the government moved to dismiss all the
 24

25 ³ In my Order granting leave, I stated that I would address Local Rule 7-9’s requirements in ruling
 26 on the merits of the reconsideration motion. Leave Order at 1-2. Because I conclude that the
 27 government is not entitled to reconsideration on the merits, I do not address Local Rule 7-9’s
 28 diligence requirement. Although I do not directly address Local Rule 7-9(b)’s requirement that
 the moving party show a material change in fact or law, or a manifest error by the court, I address
 substantially similar issues in analyzing the merits of the reconsideration motions under Ninth
 Circuit law.

1 claims brought by San Francisco and Santa Clara.⁴ In its motions to dismiss, the government
 2 asserts that the Counties lack standing to challenge the Executive Order, especially in light of the
 3 guidance issued in the AG Memorandum, because the Executive Order is an internal directive that
 4 does not purport to change the law. It further asserts that the plaintiffs have failed to state any
 5 claim against the Executive Order. The government also moves to dismiss San Francisco's claim
 6 for a declaration that it complies with section 1373 on the grounds that San Francisco has not
 7 identified an independent cause of action to seek declaratory relief and its claim is non-justiciable.

8 LEGAL STANDARD

9 RECONSIDERATION

10 Under the Northern District's local rules, before filing a motion for reconsideration a party
 11 must obtain leave of court. Civil L.R. 7-9(a). To obtain leave, the party must "specifically show
 12 reasonable diligence in bringing the motion" and one of the following:

13 (1) That at the time of the motion for leave, a material difference in
 14 fact or law exists from that which was presented to the Court before
 15 entry of the interlocutory order for which reconsideration is sought.
 16 The party also must show that in the exercise of reasonable diligence
 17 the party applying for reconsideration did not know such fact or law
 18 at the time of the interlocutory order; or

17 (2) The emergence of new material facts or a change of law
 18 occurring after the time of such order; or

18 (3) A manifest failure by the Court to consider material facts or
 19 dispositive legal arguments which were presented to the Court
 20 before such interlocutory order.

20 Civil L. R. 7-9(b)(1)-(3).

21 Once a reconsideration motion is filed, reconsideration is appropriate "if the district court
 22 (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision
 23 was manifestly unjust, or (3) there is an intervening change in controlling law." *Sch. Dist. No. 1J,*
 24 *Multnomah Cnty., Or. v. ACandS Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993).

27 _____
 28 ⁴ The government has also moved to dismiss the claims brought by the City of Richmond in the
 related action *City of Richmond v. Trump*, No. 17-cv-1535. I will address that motion in a separate
 order.

MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), a district court must dismiss a complaint if it fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when the plaintiff pleads facts that “allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). There must be “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* While courts do not require “heightened fact pleading of specifics,” a plaintiff must allege facts sufficient to “raise a right to relief above the speculative level.” *Twombly*, 550 U.S. at 555, 570.

In deciding whether a plaintiff has stated a claim upon which relief can be granted, the court accepts plaintiff’s allegations as true and draws all reasonable inferences in favor of the plaintiff. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to accept as true “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

A motion to dismiss filed pursuant to Rule 12(b)(1) is a challenge to the court’s subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). “Federal courts are courts of limited jurisdiction,” and it is “presumed that a cause lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins. of Am.*, 511 U.S. 375, 377 (1994). The party invoking the jurisdiction of the federal court bears the burden of establishing that the court has the requisite subject matter jurisdiction to grant the relief requested. *Id.*

A challenge pursuant to Rule 12(b)(1) may be facial or factual. *See White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). In a facial attack, the jurisdictional challenge is confined to the allegations pled in the complaint. *See Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004). The challenger asserts that the allegations in the complaint are insufficient “on their face” to invoke federal jurisdiction. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). To resolve this challenge, the court assumes that the allegations in the complaint are true

1 and draws all reasonable inferences in favor of the party opposing dismissal. *See Wolfe*, 392 F.3d
2 at 362.

3 “By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by
4 themselves, would otherwise invoke federal jurisdiction.” *Safe Air*, 373 F.3d at 1039. To resolve
5 this challenge, the court “need not presume the truthfulness of the plaintiff’s allegations.” *Id.*
6 (citation omitted). Instead, the court “may review evidence beyond the complaint without
7 converting the motion to dismiss into a motion for summary judgment.” *Id.* (citations omitted).
8 Once the moving party has made a factual challenge by offering affidavits or other evidence to
9 dispute the allegations in the complaint, the party opposing the motion must “present affidavits or
10 any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses
11 subject matter jurisdiction.” *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989); *see also*
12 *Savage v. Glendale Union High Sch. Dist. No. 205*, 343 F.3d 1036, 1040 n.2 (9th Cir. 2003).

13 DISCUSSION

14 I. RECONSIDERATION

15 The government has moved for reconsideration of my preliminary injunction order.
16 Under Ninth Circuit precedent, reconsideration is only appropriate “if the district court (1) is
17 presented with newly discovered evidence, (2) committed clear error or the initial decision was
18 manifestly unjust, or (3) there is an intervening change in controlling law.” *See Sch. Dist. No. 1J,*
19 *Multnomah Cnty., Or.*, 5 F.3d at 1263. The government does not contend that I committed clear
20 error in my initial decision or manifestly failed to consider material facts or dispositive legal
21 arguments. Instead, it argues that the AG Memorandum represents a change in law and is a new
22 material fact that justifies reconsideration.

23 A. Whether the AG Memorandum Reflects a Change in Controlling Law

24 The government does not contend that the AG Memorandum is controlling authority that
25 binds this court. *See Gov. Recon. Reply* at 5 n.6. It does suggest that the AG Memorandum
26 undermines my prior conclusions regarding the meaning and scope of the Executive Order and
27 should be credited because it is the “conclusive” interpretation of the Attorney General. *Id.* at 7-
28 11.

1 This argument is not persuasive. If, as the government admits, the AG Memorandum is
 2 not new controlling authority, it is persuasive only to the extent that it is an accurate and credible
 3 reading of the Executive Order. *See Comite de Jornaleros de Redondo Beach v. City of Redondo*
 4 *Beach*, 657 F.3d 936, 946 (9th Cir. 2011)(while a court must “consider the City’s authoritative
 5 constructions of the Ordinance, including its implementation and interpretation of it,” it need not
 6 “adopt an interpretation precluded by the plain language of the ordinance.”). It is unnecessary to
 7 address the merits of the interpretation outlined in the AG Memorandum because it is the same
 8 interpretation the government proposed at oral argument; I have already assessed and rejected it as
 9 not legally plausible. *See SC Recon. Oppo.* at 6-8.

10 A motion for reconsideration should not “be used to ask the Court to rethink what it has
 11 already thought,” *Garcia v. City of Napa*, No. C-13-03886-EDL, 2014 WL 342085, at *1 (N.D.
 12 Cal. Jan. 28, 2014), and is not a “substitute for appeal or a means of attacking some perceived
 13 error of the court.” *Washington v. Sandoval*, C-10-0250-LHK, 2011 WL 2039687, at *1 (N.D.
 14 Cal. May 24, 2011). Because the AG Memorandum is not new controlling authority and only
 15 repeats an interpretation of the Executive Order that I have already rejected, it does not justify
 16 reconsideration as a “change in controlling authority.”

17 **B. Whether the AG Memorandum Reflects a Material Change in Fact or**
 18 **Evidence**

19 The government submits that the AG Memorandum reflects a material change in fact or
 20 evidence because it is formal guidance from the Attorney General regarding the scope and
 21 meaning of the Executive Order that binds DOJ and other federal agencies. *Id.* It argues that “the
 22 significance of the AG Memorandum lies not only in what it says, but also in the fact that the
 23 Attorney General himself has now provided guidance, and in a formal way that is binding on those
 24 who will implement the grant eligibility provision – thus directly affecting the likelihood that the
 25 Order could be implemented in any way that violates the Constitution or injures the plaintiffs.”
 26 *Gov. Recon. Reply* at 3.

27 **1. Illusory Promises to Enforce a Law Narrowly Do Not Resolve**
 28 **Challenges to the Law Itself**

In opposition, the Counties contend that the AG Memorandum is nothing new and merely

1 states the same reading of the Executive Order that the government presented at the hearing and
2 which I have already rejected. They assert that to the extent the AG Memorandum reflects a
3 commitment to implement the Executive Order more narrowly than it is written, similar promises
4 are routinely rejected by courts as illusory and should not impact the analysis here. *See e.g., City*
5 *of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 (1988).

6 For example, in *City of Lakewood*, the Supreme Court considered whether a local
7 ordinance that gave the mayor near unbridled discretion to reject permits was constitutional. *Id.*
8 The City had urged the Court to presume that “the mayor will act in good faith and adhere to
9 standards absent from the ordinance’s face.” *Id.* The Court declined to do so, holding that
10 limitations on the discretion of a government actor must be “made explicit by textual
11 incorporation, binding judicial or administrative construction, or well-established practice.” *Id.*

12 Similarly in *Doe v. Harris*, the Ninth Circuit upheld a preliminary injunction order
13 enjoining enforcement of a California statute that required sex offenders to disclose their online
14 usernames and passwords to the state and which the state could then disclose to the public “when
15 necessary to ensure the public safety.” *Doe v. Harris*, 772 F.3d 563, 579-80 (9th Cir. 2014). The
16 Ninth Circuit rejected the state’s argument that “existing constraints on law enforcement
17 activities” would prevent the statute from being implemented in an unconstitutional way, holding
18 that a “promise from the State that it will use the power appropriately is not sufficient.” *Id.* at 580-
19 581; *see also United States v. Stevens*, 559 U.S. 460, 480 (2010) (the Executive Branch’s
20 reassurance that it construed a statute as applying only to “extreme” animal cruelty and that it
21 “neither has brought nor will bring a prosecution for anything less” did not resolve a constitutional
22 challenge based on the text of the statute); *United States v. Nosal*, 676 F.3d 854, 862 (9th Cir.
23 2012) (“The government assures us that, whatever the scope of the CFAA, it won’t prosecute
24 minor violations. But we shouldn’t have to live at the mercy of our local prosecutor.”).

25 Even a formalized promise from those charged with enforcing an offending statute may be
26 insufficient. *See City of Redondo Beach*, 657 F.3d at 946. In *City of Redondo Beach*, the City had
27 submitted an affidavit from its City Attorney, attesting that a local Ordinance had only been
28 enforced narrowly “and that [the City Attorney] ha[d] no intention of altering this practice.” *Id.*

1 But this affidavit did not resolve the Ninth Circuit’s concern that the ordinance’s plain language
 2 raised constitutional issues. *Id.* Although the court acknowledged that it must “consider the
 3 City’s authoritative constructions of the Ordinance, including its implementation and
 4 interpretation of it,” it held that it need not “adopt an interpretation precluded by the plain
 5 language of the ordinance.” *Id.*

6 The government argues that the AG Memorandum is different than the illusory promises in
 7 the cases listed above. Gov. Recon. Reply at 4 n.4. It specifically distinguishes *Doe v. Harris*,
 8 noting that while in that case the state relied on “general principles of good police practices,” in
 9 this case “the very official charged with implementing the grant eligibility provision – and with
 10 providing legal advice to other agencies – has stated how the provision will be implemented.” *Id.*
 11 The AG Memorandum is certainly more forceful than the representations of counsel in many of
 12 the cases above, but is it the kind of binding authority that would genuinely dispel the Counties’
 13 fear of unlawful enforcement?

14 **C. Is the AG Memorandum an Illusory Promise? Or is it Truly Binding?**

15 The government asserts that the AG Memorandum is not illusory because, by longstanding
 16 tradition and practice, the Attorney General’s legal opinions are treated as authoritative by the
 17 heads of executive agencies. The Counties raise two initial responses to this argument: the AG
 18 Memorandum is not a legal opinion; and even if it is, it is not clear that the Attorney General’s
 19 legal opinions do in fact bind other agencies. In addition, they argue that this Memorandum does
 20 not bind DHS, cannot bind the Attorney General, and is therefore nothing more than an illusory
 21 promise to enforce the Executive Order narrowly.

22 **1. Is the AG Memorandum a binding legal opinion?**

23 **a. The AG Memorandum is not a legal opinion**

24 The Counties first assert that the AG Memorandum is not a legal opinion. In support of
 25 this argument they point out that the Memorandum’s title is “Implementation of Executive Order
 26 13768.” SF Recon. Oppo. at 10. The Counties assert that this title indicates that the
 27 Memorandum is an “implementation” document regarding how the Executive Order will be
 28 enforced, not a legal opinion regarding its meaning and scope. They note that the Memorandum is

1 directed only to “All Department Grant-Making Components” within DOJ, and not to any other
2 executive agency. *Id.* at 11. They contend that this also indicates that the AG Memorandum is
3 only meant to lay out a plan to enforce the Executive Order within DOJ, and is not intended to
4 offer legal guidance to other executive agencies.

5 With regards to the substance of the AG Memorandum, the Counties point out that the
6 document is only two pages long and “does nothing more than summarize the relevant terms of
7 the Executive Order and set forth the Attorney General’s determination of how he intends to carry
8 out the responsibilities it assigns to him. It offers no legal analysis or opinion regarding, for
9 example, the constitutional limits of the Executive Order’s broad language or the legal reasons
10 requiring or dictating his espoused narrowed interpretation.” *Id.*

11 The government dismisses these critiques. It asserts that the AG Memorandum is a legal
12 opinion because it “obviously deals with underlying ‘questions of law,’ such as the application of
13 8 U.S.C. 1373.” Gov. Recon. Reply at 5. That the AG Memorandum “deals with underlying
14 questions of law” is not persuasive evidence that it is in fact a legal opinion; any memorandum
15 discussing the implementation of a particular law is likely to touch on some underlying questions
16 of the law. While parts of the AG Memorandum seem to reach legal determinations,⁵ many
17 indicate only a plan of enforcement. For example, with regard to the funds at issue under the
18 Executive Order, the AG Memorandum states: “I have determined that section 9(a) of the
19 Executive Order, which is directed to the Attorney General and the Secretary of Homeland
20 Security, *will be applied* solely to federal grants administered by the Department of Justice or the
21 Department of Homeland Security, and not to other sources of federal funding.” AG
22 Memorandum at 1 (emphasis added). This statement indicates a plan to apply section 9(a) only to
23 DOJ and DHS grants, not a legal determination that the Order is actually limited solely to those
24 grants as a matter of law. Similarly, the AG Memorandum states that “I have determined that, *for*
25 *purposes of enforcing the Executive Order*, the term ‘sanctuary jurisdiction’ will refer only to
26

27 ⁵ See e.g., AG Memorandum at 1 (“Section 9(a) expressly requires enforcement ‘to the extent
28 consistent with law,’ and therefore does not call for the imposition of grant conditions that would
violate any applicable constitutional or statutory limitation.”).

1 jurisdictions that ‘willfully refuse to comply with 8 U.S.C. 1373.’ AG Memorandum at 2
 2 (emphasis added). This statement reflects a plan of enforcement, not a legal determination that the
 3 Order could not bear a broader reading of “sanctuary jurisdictions” if desired.

4 The AG Memorandum is directed only to grant-making components within DOJ, is labeled
 5 as an “implementation” memorandum, is only two pages long, does not engage in substantive
 6 legal analysis, and primarily outlines plans to enforce the order, rather than an opinion on its
 7 meaning or scope. It does not appear to be a legal opinion that might be binding authority on
 8 other federal agencies or DHS.

9 **2. Even if it is a legal opinion, the AG Memorandum does not clearly bind**
 10 **other executive agencies**

11 The government asserts that Attorney General legal opinions are binding on executive
 12 agencies both by tradition and as a result of the Attorney General’s statutory duties. Case law
 13 does not conclusively support the government’s position that all Attorney General Memoranda are
 14 binding on the executive branches.

15 In support of its argument, the government cites *Tenaska Washington Partners II, L.P. v.*
 16 *United States*, 34 Fed. Cl. 434, 439 (1995) in which the Court of Federal Claims stated that
 17 “Memoranda issued by the [Office of Legal Counsel], including this one, are binding on the
 18 Department of Justice and other Executive Branch agencies and represent the official position of
 19 those arms of government.” It also cites *ACLU v. Dep’t of Def.*, 396 F. Supp. 2d 459, 462
 20 (S.D.N.Y. 2005) in which the Southern District of New York stated that “The Office of the
 21 Attorney General of the DOJ is empowered to furnish advice and opinions on legal matters to
 22 government agencies, 28 C.F.R. § 0.5 (2005), and has issued public memoranda interpreting the
 23 Convention Against Torture.”

24 While these cases offer some support for the government’s position, they are also clearly
 25 distinguishable from the facts here. Both dealt with formal and reasoned legal opinions prepared
 26 by the Office of Legal Counsel. In addition, while *ACLU* acknowledges that the Attorney General
 27 may furnish advice and opinions to government agencies, it does not address the primary issue
 28 here, whether those opinions are then binding on the agencies. *See ACLU*, 396 F. Supp. 2d 462.

1 The government’s reliance on *Tenaska* and *ACLU*, two non-binding lower court cases, one
2 of which does not address the issue at hand, demonstrates that whether an Attorney General
3 memorandum is binding is not a settled issue of law. This conclusion is further supported by one
4 of the secondary sources the government cites, which itself notes that “the question of whether
5 (and in what sense) the opinions of the Attorney General, and, more recently, the Office of Legal
6 Counsel, are legally binding within the executive branch remains somewhat unsettled.” *See*
7 *Randolph Moss, Executive Branch Legal Interpretation: A Perspective from the Office of Legal*
8 *Counsel*, 52 Admin. L. Rev. 1303, 1318 (2000).

9 Nor do the statutes the government cites offer persuasive support for its position. It asserts
10 that the Attorney General’s memoranda are binding on other agencies because the Attorney
11 General has a statutory duty to advise executive department heads on “questions of law,” 28
12 U.S.C. § 512, and to furnish formal legal opinions to executive agencies, 28 C.F.R. § 0.5(c).
13 While section 512 allows a department head to request and receive an Attorney General opinion
14 on “questions of law arising in the administration of his department,” 28 U.S.C. § 512, it does not
15 address whether such an opinion would bind the relevant department; moreover, it is inapplicable
16 to the facts here since there has been no such request. And while section 0.5(c) requires the
17 Attorney General to provide “formal and informal” advice and opinions “on legal matters,” 28
18 C.F.R. § 0.5(c), it is silent on whether any such advice would bind other agencies.

19 The AG Memorandum does not appear to be a legal opinion, and the law is unsettled on
20 whether such opinions are binding on other agencies. The government has not persuasively
21 demonstrated that the AG Memorandum is “binding” on other agencies as a legal opinion.

22 **3. Does the AG Memorandum Bind DHS as an Opinion re Immigration** 23 **Enforcement?**

24 The government asserts that the AG Memorandum binds DHS because, although the
25 Secretary of the Department of Homeland Security administers the immigration laws, the
26 Immigration and Nationality Act states that a “determination and ruling by the Attorney General
27 with respect to all questions of law shall be controlling.” 8 U.S.C. § 1103(c)(1). But the AG
28 Memorandum is not clearly a determination or ruling on a question of immigration law. The AG

1 Memorandum is an internal DOJ implementation order, is not directed to DHS, and does not
 2 appear to be a legal opinion. This two-page order outlining how the Executive Order will be
 3 implemented within DOJ is not fairly read as a determination and ruling of law that might be
 4 controlling on the Secretary of the Department of Homeland Security.

5 **4. Does the AG Memorandum Bind DOJ and the Attorney General?**

6 The final and most glaring problem with the AG Memorandum is that it is not binding on
 7 the Attorney General. As the Counties point out, the Attorney General could, at any time, revoke
 8 the AG Memorandum and issue new guidance. Or the President could replace the Attorney
 9 General to revoke it.

10 The government does not dispute that the AG Memorandum is revocable, but notes that
 11 “that is true of any authoritative guidance issued by a federal official.” Gov. Recon. Reply at 6.
 12 That the AG Memorandum shares this trait with other federal guidance does nothing to resolve the
 13 issue here. The problem with the AG Memorandum, like the promises from *Harris*, *Stevens*, and
 14 *City of Redondo Beach*, is that it is a self-imposed restriction. Where the problem with a law is
 15 that it grants excessive discretion or power to a particular official, the problem cannot be resolved
 16 by having that same official impose a revocable limitation on himself. Such a restriction does not
 17 have the type of exterior oversight that the Supreme Court has held is necessary to cabin unbridled
 18 discretion. *See City of Lakewood*, 486 U.S. at 770 (limitations on the discretion of a government
 19 actor must be “made explicit by textual incorporation, binding judicial or administrative
 20 construction, or well-established practice.”). Although more formal than a bare promise, because
 21 the AG Memorandum will remain in effect only so long as the Attorney General or the President
 22 see fit, it is still effectively a “promise from the State that it will use the power appropriately” and
 23 “is not sufficient” to cabin the Executive Order. *Harris*, 772 F.3d at 579-80.

24 I conclude that the AG Memorandum is functionally an “illusory promise” to enforce the
 25 Executive Order narrowly and, as such, does not resolve the constitutional claims that the
 26
 27
 28

1 Counties have brought based on the Order's language.⁶ As the AG Memorandum reflects the
2 same interpretation of the Executive Order that government counsel proposed at the preliminary
3 injunction hearing, and which I considered and rejected in the PI Order, it is not a material change
4 in fact or evidence that would impact my prior analysis.

5 Because the AG Memorandum reflects neither a change in controlling authority nor a
6 material change in fact or evidence, it does not support reconsideration of the PI Order. The
7 government's motions for reconsideration are DENIED.

8 **II. MOTIONS TO DISMISS**

9 The government moves to dismiss the Counties' claims. It leans heavily on the AG
10 Memorandum, which it asserts demonstrates that the Counties lack standing, that their claims are
11 not ripe, and that their claims challenging the Executive Order are meritless. SF MTD (SF Dkt.
12 No. 111); SC MTD (SC Dkt. No. 115). As discussed with regard to the motions for
13 reconsideration, the AG Memorandum does not resolve the Executive Order's constitutional
14 issues or alter the analysis from the PI Order. Accordingly, I do not credit the AG Memorandum's
15 findings in assessing the government's motions to dismiss. This substantially simplifies resolution
16 of the government's motions as I addressed most of the arguments it raises now, in detail, in the PI
17 Order. Instead of repeating my prior analysis here, I will simply refer to the relevant portions of
18 my prior order where appropriate. I have not previously discussed San Francisco's declaratory
19 relief claim and so address the government's motion to dismiss that claim below.

20 **A. Plaintiffs Have Standing and Their Claims are Ripe**

21 The government argues that the plaintiffs lack standing and that their claims are unripe. In
22 the PI Order I dedicated twenty-five pages to these issues with regards to San Francisco and Santa
23 Clara and concluded that the Counties have standing to challenge the Executive Order. *See* PI
24 Order at 11-35. I also concluded that the Counties' claims were ripe. San Francisco and Santa
25 Clara have established standing and ripeness.

26
27 ⁶ For the same reasons, the AG Memorandum does not meaningfully dispel the Counties' fear of
28 irreparable harm resulting from budget uncertainty. With nothing preventing the AG
Memorandum from being revoked or overwritten, absent the preliminary injunction, the Counties
would still face a genuine threat that the Executive Order could be enforced broadly.

1 **B. The Executive Order is not an Internal Directive**

2 The government contends that the plaintiffs' claims must be dismissed because the
3 Executive Order is an internal directive and does not change the law. In the PI Order, I concluded
4 that the Executive Order is not an internal directive and does change the law. *See* PI Order at 12-
5 16.

6 **C. The Plaintiffs Have Stated Valid Claims Challenging Section 9(a) of the
7 Executive Order**

8 The government asserts that Santa Clara and San Francisco have failed to state any claim
9 challenging section 9(a) of the Executive Order. In the PI Order, I found that the Counties were
10 likely to succeed on all of their claims against the Executive Order. *See* PI Order at 35-44. In
11 concluding that the Counties were likely to succeed on these claims, I necessarily concluded that
12 the Counties had adequately stated these claims, a considerably lower burden. Accordingly, as
13 specified below, I conclude that the Counties have adequately stated all their claims challenging
14 section 9(a) of the Executive Order.

15 **1. The Counties' Separation of Powers Claims**

16 The government asserts that Santa Clara and San Francisco have failed to state a separation
17 of powers claim. As detailed in the PI Order, the Counties have adequately stated a separation of
18 powers claim. *See* PI Order at 35-37.

19 **2. The Counties Spending Clause Claims**

20 The government asserts that Santa Clara and San Francisco have failed to state a spending
21 clause violation claim. As detailed in the PI Order, the Counties have adequately stated a
22 spending clause violation claim. *See* PI Order at 37-41.

23 **3. San Francisco's Tenth Amendment Claim**

24 The government asserts that San Francisco has failed to state a Tenth Amendment
25 violation. As detailed in the PI Order, San Francisco has adequately stated a Tenth Amendment
26 violation. *See* PI Order at 39-41.

27 **4. Santa Clara's Fifth Amendment Vagueness Claim**

28 The government asserts that Santa Clara has failed to state a Fifth Amendment vagueness
claim. As detailed in the PI Order, Santa Clara has adequately stated a Fifth Amendment

1 vagueness claim. *See* PI Order at 41-43.

2 **5. Santa Clara’s Fifth Amendment Procedural Due Process Claim**

3 The government asserts that Santa Clara has failed to state a Fifth Amendment procedural
4 due process claim. As detailed in the PI Order, Santa Clara has adequately stated a Fifth
5 Amendment procedural due process claim. *See* PI Order at 43-44.

6 **D. San Francisco’s Declaratory Relief Claim**

7 San Francisco has brought a claim for declaratory relief seeking a declaration that its laws
8 comply with section 1373. The government moves to dismiss this claim. It asserts that San
9 Francisco has failed to identify a right of action in section 1373 or elsewhere that would allow it to
10 pursue declaratory relief and that “the declaration that plaintiff seeks would constitute a prohibited
11 advisory opinion.” SF MTD at 11.

12 **1. San Francisco Must Demonstrate an “Actual Controversy” to Seek
13 Declaratory Relief Under the Declaratory Judgment Act**

14 Despite the government’s assertions, San Francisco does not need to demonstrate an
15 independent cause of action to seek a declaration that it complies with section 1373. Instead, it
16 must demonstrate that there is an actual legal controversy regarding its compliance with section
17 1373 in order to pursue declaratory relief under the Declaratory Judgment Act.

18 The government correctly notes that the Declaratory Judgment Act creates a remedy for
19 litigants but is not an independent cause of action. *See, e.g., Muhammad v. Berreth*, No. C 12-
20 02407 CRB, 2012 WL 4838427, at *5 (N.D. Cal. Oct. 10, 2012) (“Declaratory relief is not an
21 independent cause of action or theory of recovery, only a remedy. The [Declaratory Judgment
22 Act] does not itself confer federal subject-matter jurisdiction.”) (citation and internal quotation
23 marks omitted). However, it draws the wrong conclusion from this well-established holding,
24 asserting that a plaintiff must have some other independent statutory right to bring a plausible
25 claim for declaratory relief. SF MTD at 11. If that were the case, the Declaratory Judgment Act
26 would be meaningless; any plaintiff able to seek declaratory relief would already have an
27 independent right to do so. What this rule clarifies is that the Declaratory Judgment Act “does not
28 itself confer federal subject-matter jurisdiction” and that a plaintiff seeking declaratory relief must

1 independently establish that it has standing to seek relief. *Fid. & Cas. Co. v. Reserve Ins. Co.*, 596
2 F.2d 914, 916 (9th Cir. 1979).

3 To establish Article III standing and seek relief under the Declaratory Judgment Act, a
4 plaintiff must demonstrate that its claim involves an “actual controversy.” *See Aetna Life Ins. Co.*
5 *v. Haworth*, 300 U.S. 227, 240 (1937); 28 U.S.C. § 2201(a) (“In a case of actual controversy
6 within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal
7 relations of any interested party seeking such declaration, whether or not further relief is or could
8 be sought.”). This means that the dispute must be “definite and concrete, touching the legal
9 relations of parties having adverse legal interests” and be “real and substantial.” *Aetna*, at 240-
10 241. “Basically, the question in each case is whether the facts alleged, under all the
11 circumstances, show that there is a substantial controversy, between parties having adverse legal
12 interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”
13 *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

14 **2. San Francisco Has Demonstrated an “Actual Controversy” regarding**
15 **its Compliance with Section 1373**

16 There is a real and immediate controversy between San Francisco and the federal
17 government regarding whether San Francisco complies with section 1373. Although the
18 government has not sued San Francisco for failing to comply with section 1373 and has not
19 declared San Francisco a “sanctuary jurisdiction” under section 9(a) of the Executive Order, in
20 many statements, official writings, and opinion pieces, key government officials have repeatedly
21 indicated that, in the eyes of the federal government, San Francisco’s policies do not comply with
22 federal law.

23 For example, in a March 27, 2017 statement on sanctuary cities, Attorney General Sessions
24 criticized San Francisco for its “sanctuary policies,” noted that this type of “disregard for the law
25 must end” and indicated that DOJ would be taking steps to ensure compliance with section 1373.
26 *See SF. RJN Ex. D. (SF Dkt. No. 116-4).*⁷ In a statement to law enforcement representatives in

27 ⁷ I take judicial notice of RJN Ex. D; a press release dated March 27, 2017 and titled “Attorney
28 General Jeff Sessions Delivers Remarks on Sanctuary Jurisdictions.” Attorney General Sessions’s
statements in this document are judicially noticeable at the statements “can be accurately and

1 Las Vegas on the day of the hearing on these motions, the Attorney General noted that “[s]ome
2 300 jurisdictions in this country refuse to cooperate with federal immigration authorities,” and,
3 that “politicians have forbidden [local law enforcement] to help.” SF. 2nd Supp. RJN Ex. A at 2
4 (SF Dkt. No. 139).⁸ He specifically called out San Francisco as one of the cities that “have these
5 policies.” *Id.* Representative John Culberson, who chairs the House of Representatives
6 subcommittee that controls DOJ spending, and who has helped condition certain DOJ grants on
7 compliance with section 1373, has stated that a sanctuary city is any city that “[v]iolates 8 U.S.C.
8 Code 1373,” SF RJN Ex. U at 2 (SF Dkt. No. 116-21),⁹ and that section 1373 “bars state and local
9 officials from interfering ‘in any way’ with requests for personal immigration information by
10 federal authorities.” SF RJN Ex. E at 3-4 (SF Dkt. No. 116-5).¹⁰ Culberson has indicated his clear
11 belief that San Francisco is in violation of section 1373, noting that it was San Francisco’s
12 sanctuary policies and the murder of Kate Steinle that galvanized him to ensure that DOJ grants
13 would be conditioned on compliance with section 1373 in the first place. SF RJN Ex. U at 6.
14 When questioned regarding San Francisco’s lawsuit challenging the Executive Order, Culberson
15 confidently asserted that San Francisco would ultimately lose and would not receive any federal
16 money because it doesn’t “follow federal law.” SF RJN Ex. E at 11. Finally, in a formal

17
18 readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid.
19 § 201(b)(2). They are also judicially noticeable because they were posted on an official
20 government website. *See Daniels-Hall v. Nat’l Educ. Ass’n*, 629 F.3d 992, 998-99 (9th Cir. 2010).

21
22 ⁸ I take judicial notice of 2nd Supp. RJN Ex. A; a press release dated July 12, 2017 and titled
23 “Attorney General Jeff Sessions Delivers Remarks in Las Vegas to Federal, State and Local Law
24 Enforcement About Sanctuary Cities and Efforts to Combat Violent Crime.” Attorney General
25 Sessions’s statements in this document are judicially noticeable at the statements “can be
26 accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”
27 Fed. R. Evid. § 201(b)(2). They are also judicially noticeable because they were posted on an
28 official government website. *See Daniels-Hall*, 629 F.3d at 998-99.

⁹ I take judicial notice of RJN Ex. U, a copy of Jeff Sessions, John Culberson, Dennis Herrera,
Jose Antonio Vargas, Op-Ed, 4 Voices: Are Sanctuary Cities Good for the Community, S.F.
Chron., Apr.7, 2017, as it contains the statements of government officials which “can be
accurately and readily determined from sources whose accuracy cannot reasonably be questioned.”
Fed. R. Evid. § 201(b)(2).

¹⁰ I take judicial notice of RJN Ex. E, a copy of the article “Did Culberson Misfire when he took a
shot a ‘sanctuary city’ funds?”, Houstonchronicle.com, updated March 19, 2017, as it contains the
statements of government officials which “can be accurately and readily determined from sources
whose accuracy cannot reasonably be questioned.” Fed. R. Evid. § 201(b)(2).

1 Memorandum assessing potential violations of section 1373, Inspector General Michael Horowitz
2 indicated that San Francisco’s policies appear to be “inconsistent” with section 1373’s
3 requirements. SF. RJN Ex. F at 6 n.7 (SF Dkt. No. 116-6).¹¹

4 Given that key government actors charged with enforcing compliance with section 1373
5 have repeatedly called out San Francisco for its sanctuary policies and non-compliance with
6 federal immigration law, it appears there is a “real and substantial” dispute regarding whether San
7 Francisco complies with section 1373. The government could resolve this dispute by bringing a
8 federal preemption suit and challenging the legality of San Francisco’s sanctuary policies (or by
9 disavowing that it has any intent to do so), but it has not done so. Meanwhile, it indicates that it
10 intends to expand the number of federal grants conditioned on compliance with section 1373 and
11 to enforce any conditions already in place.

12 “The Declaratory Judgment Act was designed to relieve potential defendants from the
13 Damoclean threat of impending litigation which a harassing adversary might brandish, while
14 initiating suit at his leisure or never. The Act permits parties so situated to forestall the accrual of
15 potential damages by suing for a declaratory judgment, once the adverse positions have
16 crystallized and the conflict of interests is real and immediate.” *Societe de Conditionnement en*
17 *Aluminium v. Hunter Engineering Co.*, 655 F.2d 938, 943 (9th Cir. 1981). Because San Francisco
18 has demonstrated an “actual controversy” regarding its compliance with section 1373, it need not
19 sit back and wait, as the potential liability for its potential noncompliance with section 1373
20 increases. The Declaratory Judgment Act permits it to seek declaratory relief to resolve this “real
21 and substantial” legal dispute.

22 San Francisco has stated a justiciable claim for declaratory relief.

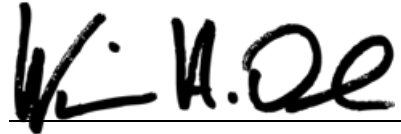
23
24
25 _____
26 ¹¹ I take judicial notice of RJN Ex. F, a copy of a Memorandum prepared by Michael E. Horowitz,
27 Inspector General, U.S. Department of Justice, to Karol V. Mason, Assistant Attorney General for
28 the Office of Justice Programs, U.S. Department of Justice, entitled “Department of Justice
Referral of Allegations of Potential Violations of U.S.C. § 1373 by Grant Recipients,” dated May
31, 2016, because government memoranda, bulletins, reports, letters, and statements of public
record are appropriate for judicial notice. See *Brown v. Valoff*, 422 F.3d 926, 933 n.9 (9th Cir.
2005).

CONCLUSION

As outlined above, the government’s motions for reconsideration and to dismiss San Francisco’s and Santa Clara’s claims are DENIED. It shall answer the complaints within twenty days.

IT IS SO ORDERED.

Dated: July 20, 2017



William H. Orrick
United States District Judge

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28